No. 85-1129

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PAUL E. JOHNSON,

Petitioner,

v.

TRANSPORTATION AGENCY,
SANTA CLARA COUNTY, CALIFORNIA,
and
SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 715,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a local government may, consistent with Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), voluntarily adopt and apply a limited affirmative action plan under which the gender of applicants may be considered in making hiring and promotion decisions in order to remedy past discrimination evidenced by a gross statistical disparity in the representation of males and females in skilled craft positions.

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INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include municipal and county governments and their officials located throughout the United States, have a vital interest in legal issues that affect local governments. In this case, petitioner, a white male employee of a local government agency who failed to obtain a promotion, brought suit, alleging that the agency had discriminated against him in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by applying a limited, voluntarily adopted affirmative action plan in making the promotion decision.

The decision in this case will have a significant effect on local governments. Hundreds of local governments have voluntarily adjusted their employment practices in an effort to rectify past discrimination and thereby to assure compliance with Title VII. The type of [illegible]ary affirmative action plan at issue in this case, [illegible]ich race or gender may be used as a "plus factor" in making hiring and promotion decisions, is common. If the position of petitioner and his supporting *amici* were to prevail, local governments with gross statistical disparities in the composition of their work forces would effectively be barred from undertaking this limited form of voluntary affirmative action.

Affirmative action plans like the one at issue here are implemented without using quotas or violating the merit selection procedures of applicable civil service laws. Local governments have found that such plans provide the most practical and flexible way for them to eradicate the effects of past discrimination without infringing on any significant interests of nonminority employees. These plans are generally developed on the basis of community-wide participation, including various public proceedings, involvement of employee groups, and negotiations with the collective bargaining representatives of all employees who could be affected by the plan, including nonminority employees. They therefore are likely to be more workable and fair than a plan imposed by court order or through a consent decree.

In advocating a requirement that the employer not only introduce highly probative statistical evidence, but also prove its own prior discrimination, petitioner and the federal government would impose an impossible burden on local governments that are attempting, in good faith, to implement a voluntary remedy. Such a burden would deter voluntary efforts to comply with Title VII and would make case-by-case litigation the only realistic means of assuring compliance with the nation's most basic civil rights law. Such a requirement would create years of litigation, would place an intolerable burden

on local governments, and ultimately would frustrate the objectives of Title VII.*

STATEMENT

1. In 1978, respondent Transportation Agency of Santa Clara County voluntarily adopted an affirmative action plan intended in part "to provide women the maximum possible opportunity to obtain equitable employment and career progression in the Agency's professional, technical and skilled job classifications where women have not been traditionally employed and where they are presently underrepresented" (J.A. 34). Respondent stated in the plan that affirmative action was necessary "to remedy the effects of past practices" and that the plan would benefit its employees "who may have been subjected to discriminatory personnel practices in the past" (J.A. 31, 35).[1] The plan incorporated nondiscrimination requirements imposed by the Urban Mass Transportation Administration and other governmental agencies (J.A. 39, 40).[2] Respondent's long-term goal was, and is, to attain a work force employing minorities, women and handicapped persons "in numbers consistent with the ratio of these groups in the area work force" (J.A. 31).

Respondent emphasized in the plan that none of its 238 skilled craft positions was filled by a woman at the time that the plan was adopted. Similarly, only one out of respondent's 110 road maintenance workers was a

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* Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[1] The evidence at trial included examples of alleged discrimination by respondent. See J.A. 20-21; Tr. 252-253. Respondent's director stated that "a number of charges" of discrimination against women had been brought against the Agency since 1978 (Tr. 43).

[2] Numerous federal statutes and executive orders impose equal employment opportunity responsibilities on state and local governments. See, *e.g.*, 15 U.S.C. 636(j)(9); 31 U.S.C. 6716; Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11375, 32 Fed. Reg. 14303 (1967).

woman. The area work force, by contrast, was composed at the time of over 36% women. J.A. 54. While its earlier affirmative action efforts had resulted in substantial increases in the employment of racial and ethnic minorities, especially in newly created positions, respondent recognized that "[w]omen are the most underrepresented group in the Agency" (J.A. 53). Respondent concluded that "it will be a slow and extremely difficult task to attain the Agency's Affirmative Action employment goals," especially with respect to women in areas, such as skilled crafts, "where they have traditionally been greatly underrepresented" (J.A. 58, 60).

The plan provided that respondent would attempt to meet its long-term employment goal by giving "special consideration" to female applicants for new or vacated positions in areas where women were underrepresented, as well as through recruitment, training, validation of selection criteria, and similar activities (J.A. 60, 65-84). Respondent's plan did not require the employment of a fixed quota of women or minorities.[3]

Respondent's affirmative action plan in effect at the time of trial in 1982 showed that only six out of 349 skilled craft workers then employed by the Agency were women. The long-term goal remained 36%, or 127 women. C.A. Record Excerpts 84. Of the 55 new skilled craft positions expected to become available that year,

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[3] Indeed, the county-wide affirmative action plan adopted in 1979 clearly distinguished between "goals," which were defined as "good faith quantitative objectives," and "quotas," which were defined as "fixed hiring and promotion rates" (J.A. 129-130). See also J.A. 123 ("The 'goals' * * * should not be construed as 'quotas' that must be met. The 'goals' should rather be seen as realistic desired levels of achievement * * * tak[ing] into account" turnover, vacancies, the availability of qualified female applicants, and similar factors.). The county refused to adopt voluntarily any quotas in its affirmative action plan: "Quotas are considered to be last resort measures available only for the courts to impose when good faith efforts do not exist" (J.A. 130).

respondent established a goal of filling three with women (J.A. 143).[4]

2. a. Petitioner Paul E. Johnson and Diane Joyce were employed by respondent during the time period covered by this action as road maintenance workers in the Road Operations Division of the Transportation Agency. Both had some experience as road dispatchers, a skilled craft position. Dispatchers are responsible for allocating crews and equipment to road maintenance tasks. Pet. App. 18a-19a.

Twelve persons, including petitioner and Joyce, applied for a vacant road dispatcher position in 1979. Nine of the candidates were given an oral examination by the County Personnel Department. No written test was administered. On the basis of the oral examination, seven persons were found to be qualified, with scores of 70 or above. Petitioner was tied for second with a score of 75. Joyce was next with a score of 73. A second round of oral interviews was then conducted by a three-member panel from the Road Operations Division. This panel recommended the promotion of petitioner. The director of the Agency, however, was not required by county civil service procedures to adopt the panel's recommendation. Pet. App. 4a, 11a, 18a-20a.

In the meantime, Joyce had contacted respondent's affirmative action coordinator because she was concerned about being treated unfairly, particularly by one of the Road Operations Division interviewers (Pet. App. 11a-12a, 19a; Tr. 95). The coordinator discussed the case with the Agency's director. The director subsequently concluded that petitioner and Joyce "were both capable of performing the work" (Tr. 25). He took Joyce's gender

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[4] At the time of trial, a federal class action was pending charging respondent with discrimination against women. In 1985, that case was settled by a consent decree under which respondent agreed to a goal of filling 30% of available service and driver positions with women and to pay damages to fourteen class members. We understand that respondent has lodged a copy of the consent decree with the Clerk.

"into account" as a "positive factor" in deciding to select her for the road dispatcher position (Tr. 25).

b. Petitioner commenced this action in the United States District Court for the Northern District of California, alleging that respondent's decision to promote Joyce rather than him violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[5] Following a bench trial, the district court entered judgment in petitioner's favor, ordering his promotion to road dispatcher and awarding back pay of $5,650 (Pet. App. 1a-2a, 3a-16a). The court found that petitioner would have been promoted but for his gender (*id.* at 13a). The district court took the view that respondent bore the burden of persuading the court that its affirmative action plan was consistent with the criteria set forth in *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979) (see Pet. App. 8a). The court concluded that the plan was not consistent with the requirements of *Weber* because respondent had failed to show that its plan was temporary in nature (*id.* at 6a-8a, 14a).[6]

c. The court of appeals reversed (Pet. App. 17a-47a, 48a-52a). The court stated that *Weber* "did not establish a rigid formula for testing the validity of an affirmative action plan," and that respondent's plan was "sufficiently temporary" to satisfy *Weber* because it was "not intended to maintain male-female balance, but simply to eliminate a manifest male-female imbalance" (*id.* at 24a, 25a). The court noted that respondent's plan "does not establish fixed percentages for hiring, training, or pro-

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[5] Petitioner did not allege that respondent's action violated the Equal Protection Clause of the Fourteenth Amendment. See Pet. App. 29a n.1.

[6] The district court also stated that it "d[id] not feel" that respondent had shown that it had previously engaged in a pattern of discrimination sufficient to justify its affirmative action plan (Pet. App. 9a). The court went on to assert, without any extended discussion, that respondent had not engaged in prior discrimination against women (*id.* at 13a). The court expressly declined, however, to rest its decision on this ground (*id.* at 9a-10a).

motion," but rather "allows flexibility in working towards the long-range goals, with special emphasis on recruitment, selection, training, and promotion of minorities, women, and the handicapped" (*id.* at 25a). In accordance with the plan, Joyce's gender was considered simply "as an additional positive factor in an otherwise qualified candidate" (*id.* at 29a).

The court of appeals rejected the view that respondent was required to prove its prior discrimination in order for its affirmative action plan to be legal under Title VII: "In order to demonstrate that its plan is remedial, an employer need not show its own history of purposeful discrimination. It is sufficient for the employer to show a conspicuous imbalance in its work force." Pet. App. 26a (footnote omitted). The complete absence of women among the 238 skilled craft positions satisfied this requirement.[7] Finally, the court concluded that Joyce's promotion "aptly served the Agency plan's remedial purpose" of addressing this imbalance (*id.* at 27a).[8]

SUMMARY OF ARGUMENT

This case concerns the evidence necessary under Title VII to justify an employer's voluntary decision to use gender as a "plus factor" in hiring and promotion decisions. It presents the Court with an opportunity to clarify the relationship between two lines of cases: one holding that evidence of a statistical disparity in the composition of an employer's work force may provide the basis for a discrimination claim under Title VII (see, *e.g.*, *International Bhd. of Teamsters* v. *United States*,

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[7] The court stated that the burden is on the plaintiff to prove that the affirmative action plan is invalid. It concluded, however, that even if the burden were on the employer, respondent had met that burden here. Pet. App. 30a n.2.

[8] Judge Wallace concurred in part and dissented in part (Pet. App. 32a-47a, 51a-52a). He concluded that the district court's findings were inadequate to make a decision on the validity of the plan, and he would therefore have remanded to the district court for further proceedings.

431 U.S. 324 (1977); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)); and the other holding that voluntary affirmative action is a permissible remedy for past discrimination (see, *e.g.*, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)).

There are no easy answers to the difficulty posed by affirmative action—the need to implement race or gender-conscious employment practices in order to eliminate the effects of prior discrimination, while attempting to avoid injury to innocent third parties. This case can be decided, however, on the basis of a logical and justifiable rule: an employer should be free to adopt modest affirmative action measures on the basis of statistical evidence that would be likely to expose it to liability to an unsuccessful minority candidate, without thereby making itself liable to a nonminority candidate in a reverse discrimination action. If such action is not permitted under Title VII and the Fourteenth Amendment, an employer would be "trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken" (*Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 8 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis in original)).

This rule is clearly reasonable, and petitioner and his *amici* wisely do not take direct issue with it. They would, however, eviscerate it in practical terms by requiring that the employer bear the burden of proving in court its own prior illegal discrimination in order to justify application of an affirmative action plan. Such a requirement finds no support in this Court's precedents and would serve no legitimate purpose. Moreover, it would eliminate, in substantial part, the ability and willingness of employers to comply with Title VII through voluntary affirmative action measures. Employers would thus be unable to ameliorate the effects of their prior discrimination and to reduce their exposure to liability

in actions brought by minorities. Nothing in Title VII or the Fourteenth Amendment requires such an untoward result.

ARGUMENT

A PUBLIC EMPLOYER MAY VOLUNTARILY ADOPT AND APPLY A LIMITED AFFIRMATIVE ACTION PLAN IN ORDER TO REMEDY PAST DISCRIMINATION EVIDENCED BY A GROSS STATISTICAL DISPARITY IN THE COMPOSITION OF ITS WORK FORCE

Acting on the "compelling basis" [9] of an extreme disparity between the percentage of males and females in its skilled-craft work force and their percentage in the local work force, respondent Transportation Agency of Santa Clara County voluntarily adopted a limited affirmative action plan. Pursuant to that plan, respondent's director considered Diane Joyce's gender as a flexible " 'plus' " that was "simply one element * * * in the selection process" [10] for filling a vacant road dispatcher position. The director chose Joyce, who had previously been found to be qualified and was indisputably "capable of performing the work" (Tr. 25), rather than petitioner, for the position.

Petitioner and his supporting *amici* seek to invalidate that decision on constitutional and statutory grounds as impermissible "reverse discrimination." [11] While they

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[9] *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986), slip op. 9 (O'Connor, J., concurring in part and concurring in the judgment).

[10] *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 317, 318 (1978) (Powell, J., announcing the judgment of the Court).

[11] We put to one side both petitioner's belated attempt to rely on the Fourteenth Amendment and the question whether the standard of scrutiny for gender-conscious affirmative action differs from that applicable to race-conscious affirmative action, because any differences in terminology with respect to the level of scrutiny are not dispositive. In our view, voluntary gender-conscious and race-conscious affirmative action plans should be assessed under the same criteria because any distinctions between the applicable standards would present serious logical and practical obstacles. Moreover,

grudgingly acknowledge a place for affirmative action, their position, if accepted, would in large measure bring to an end voluntary affirmative action in this country. The requirement urged by petitioner and his *amici*—that an employer prove in court its own past illegal conduct in order to justify affirmative action—would "place[] voluntary compliance with Title VII in profound jeopardy" (*United Steelworkers of America* v. *Weber*, 443 U.S. 193, 210 (1979) (Blackmun, J., concurring)). Thus, employers would be left more precariously than ever on the " 'high tightrope' " (*ibid.* (citation omitted)) between liability to minorities for past discrimination and liability to nonminorities for attempting voluntarily to remedy such discrimination: should they adopt affirmative action measures, employers would face not only the expected suits by disappointed nonminorities, but also, in defending those suits, employers would provide the foundation for their own future liability to minorities.

In analyzing this case, it is important to recognize the significant areas of agreement on the principles applicable to judging affirmative action plans. Justice O'Connor observed last Term without contradiction that "the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference" (*Wygant*, slip op. 4 (opinion concurring in part and con-

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there is no basis for petitioner's apparent contention that the Fourteenth Amendment imposes a greater burden for justification of voluntary affirmative action than does Title VII. See *Wygant*, slip op. 3 (O'Connor, J., concurring in part and concurring in the judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.").

curring in the judgment)). We support this formulation, and neither petitioner nor his *amici* have taken a contrary position. Similarly, we agree with petitioner and his *amici* that affirmative action is most clearly justified in situations where the employer discriminated in the past.[12]

Thus, the "principal issue" is "what quantum and burden of proof will serve to make out a sufficient remedial purpose" (U.S. Br. 16). Here we part company with petitioner and his *amici*. Whatever the rule may be for more far-reaching and intrusive affirmative action, the Court's precedents make clear that respondent's promotion decision is justified by the extreme statistical disparity here. In light of the realities of defending employment discrimination suits and making employment policy under the threat of litigation, to require more would serve no legitimate purpose and would frustrate the purposes of Title VII.

Requiring proof of prior discrimination as a condition of voluntary affirmative action would severely disrupt the operations of local government. Lawsuits alleging discrimination may be especially divisive when the defendant is a public entity obligated to act for the good of the community's residents. To require such an entity to prove its own failure to comply with the Constitution and laws of the United States would open old wounds, spawn endless litigation, and cause confusion and dislocation in governmental personnel systems.

Accordingly, limited affirmative action measures that do not "unnecessarily trammel" (*Weber*, 443 U.S. at 208) the interests of nonminorities should be permitted on the

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[12] While much discussed in the briefs (see, *e.g.*, U.S. Br. 13-16), the question whether discrimination by society at large may ever justify even extremely limited affirmative action is not at issue here because respondent does not rely on societal discrimination to support its hiring decision in this case. Rather, respondent established its affirmative action plan because the gross statistical disparity in the make-up of its work force indicated the probable existence of past discrimination. See pp. 3-4, *supra*.

basis of statistical evidence "sufficient to support a prima facie Title VII pattern or practice claim by minority" applicants or employees (*Wygant*, slip op. 9 (O'Connor, J., concurring in part and concurring in the judgment)). If such evidence of statistical disparity is presented, "it is incumbent upon the nonminority [plaintiffs] to prove their case; they continue to bear the ultimate burden of persuading the court that the [employer's] evidence did not support an inference of prior discrimination and thus a remedial purpose" (*id.* at 9-10).

A. Respondent's Affirmative Action Plan Satisfies Criteria Previously Approved By This Court

The affirmative action plan at issue in this case is typical of plans adopted by state and local governments across the country.[13] Like many such plans, it establishes hiring and promotion goals intended to eliminate the effects of past discrimination while minimizing the impact of these efforts on nonminorities. This type of voluntary, limited affirmative action is an important means of achieving the purposes of Title VII and the Fourteenth Amendment.

1. *Respondent's affirmative action plan is flexible and does not erect an absolute bar to advancement by nonminority applicants*

Respondent's affirmative action plan is similar to the flexible, narrowly tailored plans approved in the Court's prior cases. For example, the plan established flexible employment goals rather than unyielding quotas. See page 4 note 3, *supra;* see generally *Local 28 of the Sheet Metal Workers' International Ass'n* v. *EEOC*, No. 84-1656 (July 2, 1986), slip op. 52-53 (plurality opinion); *Fullilove* v. *Klutznick*, 448 U.S. 448, 473 (1980) (plurality opinion); *cf. Regents of the University of California* v. *Bakke, supra; United Steelworkers of Amer-*

[13] See U.S. Conference of Mayors, *Affirmative Action Programs in City Governments* (1986). Copies of this report have been lodged with the Clerk of the Court for its convenience, and served on petitioner.

ica v. *Weber*, *supra*. Indeed, the county unequivocally stated its opposition to quotas and its refusal to implement them unless ordered to do so by a court (J.A. 130).

Petitioner's assertion (Br. 41 (footnote omitted)) that "the goals were used * * * as if they were quotas" is unsubstantiated, and indeed directly contradicted by the plan itself and the testimony concerning the basis for the decision to promote Joyce. There is no evidence in the record demonstrating that nonminority applicants have always been denied jobs or promotions unless the plan's employment goal had been met, and the court of appeals expressly rejected petitioner's contention to that effect (Pet. App. 28a-29a).[14] Indeed, notwithstanding the underrepresentation of women in skilled craft positions at the time of trial, respondent predicted that it would fill only three of 55 new skilled craft positions with women during that year.

Gender was considered under respondent's plan only as an "additional positive factor in an otherwise qualified candidate" (Pet. App. 29a; see Tr. 25). In this respect, respondent's plan closely resembles the "Harvard Plan" described approvingly by Justice Powell in *Bakke* (438 U.S. at 316-318):

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats.
>
> * * * *

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[14] Petitioner does not even attempt to cite support for his claim (Br. 43) that a minority or a woman would always be promoted over a white male, and it is belied by the evidence in this case. Respondent is entitled to a presumption that it is applying the "plus factor" approach in good faith and not "as a cover for the functional equivalent of a quota system" (*Bakke*, 438 U.S. at 318 (Powell, J., announcing the judgment of the Court)). The court of appeals found that the "record contains no evidence" of "a distinct pattern of exclusion of non-minority candidates from such positions [as road dispatcher]" (Pet. App. 29a).

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.

Id. at 316, 317; see also *Sheet Metal Workers*, slip op. 52-54 (plurality opinion); *Weber*, 443 U.S. at 208. Thus, under respondent's plan and the director's decisionmaking process, petitioner presumably would have received the promotion if he had been significantly more qualified than Joyce because Joyce's gender would not have outweighed those additional qualifications. As it was, the scores were very close, and gender was enough to tip the balance in Joyce's favor.

Moreover, respondent's plan provided that most of the opportunities for women and minorities would be made available through the creation of new positions within the Agency. See J.A. 59-60; see generally *Weber*, 443 U.S. at 198 (affirmative action related to "newly created in-plant training programs"). Thus, no one was to be fired to make room for additional women and minorities. *Cf. id.* at 208. And, as the court of appeals concluded (Pet. App. 24a-25a), the plan was not shown to be a permanent fixture designed to maintain a particular balance. Rather, it is a temporary measure designed to "eliminate manifest * * * imbalance" and thus to eradicate the effects of prior discrimination. See *Sheet Metal Workers*, slip op. 53 (plurality opinion); *Weber*, 443 U.S. at 208.[15]

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[15] In any event, whether the plan might turn out to be permanent after all is irrelevant to this case. At the time that the hiring decision in issue here was made, it was clear that the effects of prior gender discrimination had not been eliminated. Petitioner's speculation that the plan might remain in effect after the need for it has passed cannot provide the basis for arguing that a decision

2. *Affirmative action in connection with promotions is substantially less burdensome than affirmative action in connection with layoffs*

Petitioner and his *amici* argue that the denial of his promotion is comparable to a layoff and that respondent's decision is therefore especially vulnerable. See Pet. Br. 36; U.S. Br. 28-29; see generally *Wygant* v. *Jackson Board of Education*, *supra*. This characterization is erroneous for a number of reasons.

First, the failure to obtain a promotion does not cause the extreme economic deprivation of a layoff. See *Wygant*, slip op. 14 (plurality opinion) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job."); see also *Sheet Metal Workers*, slip op. 6 (Powell, J., concurring in part and concurring in the judgment). Petitioner continued to be employed by respondent and did not suffer any loss in his position or its associated benefits.

Second, hiring and promotion goals do not "disrupt * * * settled expectations" (*Wygant*, slip op. 14 (plurality opinion)) to the extent that layoffs do. Unlike the protections that labor contracts normally provide against layoffs, the county's civil service rules did not guarantee promotions to the most senior employee or to the one most "qualified" under the Agency's rating system. Rather, the director was entitled under the county's civil service rules to hire any one of the seven qualified candidates and clearly could have hired Joyce over petitioner without being subject to suit if Joyce were a man. Thus, while petitioner commendably sought to advance within the Agency, he had no legal or contractual basis for assuming that he would in fact be promoted to road dispatcher at the next vacancy.[16]

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made before that time has arrived is invalid. See generally *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976).

[16] Indeed, after the first round of interviews petitioner was not the highest-ranked applicant (Pet. App. 18a). The record apparently does not disclose what happened to the candidate who ranked

Third, promotion goals, like hiring goals, "impose a diffuse burden, often foreclosing only one of several opportunities," unlike layoffs, which impose a direct and substantial burden on "particular individuals" (*Wygant*, slip op. 14-15 (plurality opinion)). While petitioner did not obtain the particular promotion in issue, he kept his job and could have had other opportunities for advancement. Indeed, petitioner suffered less injury than would an unemployed nonminority who is not hired for an entry-level position because a minority is hired under an affirmative action plan.

Finally, the Court has recognized that hiring decisions are plainly less intrusive than layoffs (see *Wygant*, slip op. 13-15 (plurality opinion)). As noted above, the burden imposed by affirmative action promotion goals is diffused throughout the entire community of qualified persons, just as it is with respect to hiring goals. Thus, there is little basis on which to make a dispositive distinction between promotion decisions and hiring decisions. *Cf. Local No. 93, International Ass'n of Firefighters* v. *City of Cleveland* (*Vanguards*), No. 84-1999 (July 2, 1986) (approving entry of consent decree providing for hiring and promotion goals).

B. A Substantial Statistical Disparity Provides An Adequate Basis On Which An Employer May Conclude That Remedial Action Is Appropriate

1. *Statistical evidence is highly probative of past discrimination*

This Court has consistently recognized that a statistical imbalance in an employer's work force "is often a telltale sign of purposeful discrimination * * *. Evidence of longlasting and gross disparity between the composition of a work force and that of the general population thus may be significant * * *." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 n.20 (1977). See also *Hazelwood School District* v. *United States*, 433

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first following the initial examination or to the candidate who was tied with petitioner at that point.

U.S. 299, 307-308 (1977) ("Where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination."); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 805 (1973); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). Just last Term, in *Bazemore* v. *Friday*, No. 85-93 (July 1, 1986), the Court reaffirmed the importance of statistical evidence in Title VII cases. Accordingly, petitioner and his *amici* are simply wrong in suggesting (Pet. Br. 24-32, U.S. Br. 16-17, 23-24) that reliance on a statistical disparity is unrelated to the determination whether there may have been actual discrimination by the employer.

The gross statistical disparity shown in this case—238 men and no women in the Road Operations Division's skilled craft positions, while women comprised 36% of the local labor force—thus provided a reasonable basis for concluding that affirmative action was appropriate to remedy past discriminatory employment practices. Indeed, evidence of such a statistical disparity might well form the basis for a prima facie case of a practice or pattern of discrimination. To be sure, there apparently was no direct evidence of the percentage of qualified women in the local labor pool, as normally would be required to establish a prima facie case. Nonetheless, such a striking disparity may, unless pervasively refuted by other evidence, provide a reasonable basis for inferring prior discrimination. As the Court stated in *International Bhd. of Teamsters*, "nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired" (431 U.S. at 340 n.20). See also, *e.g.*, *Bazemore* v. *Friday*, slip op. 13 (Brennan, J., for a unanimous Court, concurring in part) (discrimination need not be proven with "scientific certainty"); *Wygant*, slip op. 6 (plurality opinion).

2. *The Court has recognized that affirmative action may be justified on the basis of statistical evidence*

From its earliest decisions upholding affirmative action to the cases decided last Term, the Court has confirmed that a gross statistical disparity in an employer's work force provides a suitable justification for appropriately tailored affirmative action. In *Weber*, the Court upheld a plan intended "to eliminate traditional patterns of racial segregation" (443 U.S. at 201). In his concurring opinion, Justice Blackmun stated that he favored a standard under which affirmative action could be justified on the basis of evidence showing that an employer had committed an "arguable violation" of Title VII (*id.* at 211). He noted, however, that the two standards would converge in practice to the requirement of statistical evidence sufficient to establish a prima facie case of discrimination (*id.* at 213).

Similarly, in *Fullilove* v. *Klutznick*, *supra*, the Court upheld affirmative action in federal contracting based on congressional findings of a "marked statistical disparity" between the percentage of minorities in the general population and the percentage of federal contract funds going to minorities (448 U.S. at 459 (plurality opinion); see also *id.* at 502-503) (Powell, J., concurring)). The Court did not require specific evidence of the percentage of qualified minorities in the work force.

Finally, in *Wygant*, the plurality stated that affirmative action could be taken where there is "sufficient evidence to justify the conclusion that there has been prior discrimination" (slip op. 9). It reasoned (*id.* at 6) that a "statistical disparity" in an employer's work force can be sufficient to demonstrate "prior * * * discrimination" by the employer, citing *Hazelwood School District* v. *United States*, *supra*. Justice O'Connor similarly explained that "demonstrable evidence of a disparity between the percentage of qualified [minorities in the employer's work force] and the percentage of qualified minorities in the relevant labor pool sufficient to support

a prima facie Title VII pattern or practice claim by minority" applicants would provide "a compelling basis for * * * conclud[ing] that implementation of a voluntary affirmative action plan is appropriate to remedy apparent prior employment discrimination" (slip op. 9 (opinion concurring in part and concurring in the judgment)).[17]

3. *It would place employers in an intolerable position if they could not voluntarily take remedial action on the basis of evidence that is likely to expose them to liability to minorities*

The Fourteenth Amendment and Section 703(a) of Title VII establish as a fundamental principle that employers must not discriminate on the basis of race, gender, or certain other characteristics. In attempting to comply with this proscription, employers are confronted with the difficult task of alleviating the effects of prior discrimination on minorities and women without unduly impinging on the interests of nonminorities and men. There is no simple solution. On the one hand, affirmative action cannot be eschewed: "In order to get beyond racism, we must first take account of race. There is no other way." *Bakke*, 438 U.S. at 407 (opinion of Blackmun, J.). On the other hand, preferential treatment of some may mean that others are disadvantaged, an outcome that obviously should be minimized to the extent reasonably possible.

This case can, however, be decided on a clear and justifiable middle ground: an employer should be able to undertake limited affirmative action measures, in the

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[17] This case does not present questions concerning the evidence that would be required to justify more intrusive affirmative action or whether some lesser, or different, evidentiary basis might justify hiring or promotion preferences in other circumstances. In particular, this case does not concern the showing necessary to justify affirmative action with respect to positions, such as law enforcement officers, where a racial and ethnic balance reflecting that of the community might be desirable for reasons unrelated to remedying prior employment discrimination.

nature of flexible, realistic hiring or promotion goals, on the basis of "demonstrable evidence of a [statistical] disparity * * * sufficient to support a prima facie Title VII pattern or practice claim" (*Wygant*, slip op. 9 (O'Connor, J., concurring in part and concurring in the judgment)). If an employer is not allowed this measure of discretion, it cannot voluntarily remedy past discrimination or mitigate its potential liability to minorities.

C. Requiring An Employer To Prove That It Had Engaged In Purposeful Discrimination Would Be Unworkable And Unwise

Neither petitioner nor his *amici* expressly disagree with the standard described above. They would, however, eviscerate the ability of employers to undertake affirmative action in accordance with this standard by imposing the additional requirement that the employer prove its own past discrimination. Such a requirement is inconsistent with the Court's precedents, would serve no useful purpose, and is completely unworkable. An employer should be able to justify remedial action by relying on the same sort of statistical evidence which could be used by a minority employee or applicant as the basis for a Title VII action against the employer. If its affirmative action is then challenged in court, the plaintiff should be required to prove that, notwithstanding a substantial statistical disparity, the employer lacked a reasonable basis for concluding that affirmative action was needed to remedy prior discrimination. *Wygant*, slip op. 9-10 (O'Connor, J., concurring in part and concurring in the judgment).

1. *Voluntary compliance with Title VII is the preferred course*

The Court reaffirmed last Term that "Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII" (*Vanguards*, slip op. 12). And where there has been prior discrimination in violation of Title VII, affirmative action "furthers

the broad purposes underlying the statute" (*Sheet Metal Workers*, slip op. 22 (plurality opinion)). Thus, appropriately tailored voluntary affirmative action is, and must remain, a significant means to the achievement of the goal of Title VII—a workplace free of the effects of discrimination. See *Weber*, 443 U.S. at 203-208.

In *Vanguards*, the Court held that Section 706(g) of Title VII does not preclude the entry of a consent decree providing for race-conscious hiring and promotion goals by a municipal employer. In reaching this conclusion, the Court attached substantial importance to Congress's intent "to avoid undue federal interference with managerial discretion" and to permit the difficulties raised by affirmative action to be " 'handled at a governmental level closer to the American people and by communities and individuals themselves' " (slip op. 17, quoting 110 Cong. Rec. 15893 (1964) (remarks of Rep. MacGregor) (additional quotation marks omitted)).

The same local governmental discretion to which the Court referred in *Vanguards* is at the heart of this case. While the Court did not address the requirements of Section 703(a) in *Vanguards* (see slip op. 14 n.8), the result in that case would be largely undone by interpreting Section 703(a) to bar the voluntary use of affirmative action under circumstances like those in this case. Use of consent decrees to resolve lawsuits is preferable in many respects to litigation to a judgment or to settlement by private agreement without court approval. See *id.* at 21 n.13. For a number of reasons, voluntary affirmative action undertaken before litigation has commenced is even more advantageous, particularly when the employer is a local government.

First, such voluntary action means that litigation and its associated costs and disruption may be avoided altogether. Second, voluntary affirmative action—unlike litigation—permits the involvement of the entire community in devising a plan that meets the community's needs. Measures may be publicly proposed and debated, facilitat-

ing reconciliation of opposing interests, within the limits set by law, through the political process. Third, affirmative action undertaken in this manner will generally be comprehensive, addressing at once the needs of all minority and nonminority groups within the community and allowing establishment of realistic overall goals in light of all the interests at stake. In litigation, by contrast, typically only one or perhaps two minority groups may be pressing claims for relief, and nonminority employees may not be represented at all. Such litigation may therefore result in inefficient piecemeal steps that cannot readily be adjusted to accommodate the rights of unrepresented minorities and nonminorities.

For these reasons, it would make little sense to foreclose local governments from voluntarily adopting limited affirmative action to alleviate the effects of prior discrimination. To require the employer to submit to litigation does not represent sound policy and clearly was not intended by Congress.

2. *Requiring employers to prove their own past illegal conduct would sharply curtail voluntary compliance with the law*

Under the standard proposed by petitioner and his *amici*, an employer would be required to prove that it had engaged in prior illegal discrimination in order to justify affirmative action. Statistics of the sort available here would not be sufficient—the employer would have to prove, with great precision (see U.S. Br. 20-21), that it had in fact discriminated in the past and the extent of that discrimination.

Such a standard is anomalous because it would require the employer to establish facts totally at odds with its interests outside of that particular case. Proof of past discrimination would be an admission against interest that could well provide the basis for liability to minorities. Moreover, it might be inconsistent with prior positions taken by the employer in good-faith defense of

litigation brought by such groups. See generally *Wygant*, slip op. 9 (plurality opinion).[18]

Few employers, if any, would be so foolhardy as to adopt an affirmative action plan if this were the law. Rather, employers would, as a practical matter, be required to forgo voluntary compliance and to wait instead for litigation. The result would be that local governments would face liability to minorities while not being able to take modest affirmative action to rectify the problem. The net result would be that realization of the objectives of Title VII would be delayed or never achieved as discrimination could be removed from the workplace only by protracted and piecemeal litigation.

To avoid this result, the lower federal courts in Title VII cases brought by minorities have developed a privilege covering an employer's documents that evaluate its compliance with Title VII and the impact of its affirmative action programs.[19] As one court has put it,[20] "the incentives for any institution to engage in self-evaluative investigation pale considerably with the knowledge that the results may be used against it." Accordingly, "affirmative action plans are not discoverable in racial discrim-

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[18] Respondent, for example, was defending a discrimination claim brought by a class of women at the time of the trial in this case.

[19] See, *e.g.*, *Banks* v. *Lockheed-Georgia Co.*, 53 F.R.D. 283, 285 (N.D. Ga. 1971); *Webb* v. *Westinghouse Electric Corp.*, 81 F.R.D. 431, 433-434 (E.D. Pa. 1978); *Rosario* v. *New York Times Co.*, 84 F.R.D. 626, 631 (S.D.N.Y. 1979); *Roberts* v. *National Detroit Corp.*, 87 F.R.D. 30, 32 (E.D. Mich. 1980); *O'Connor* v. *Chrysler Corp.*, 86 F.R.D. 211, 216-218 (D. Mass. 1980); *McClain* v. *Mack Trucks, Inc.*, 85 F.R.D. 53, 58 (E.D. Pa. 1979); see generally Note, *The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083, 1089-1090 (1983). But see *Resnick* v. *American Dental Ass'n*, 95 F.R.D. 372 (N.D. Ill. 1982). Even if a state statute might permit access to certain governmental documents that would be protected in the case of a private employer, the rationale behind the privilege remains directly relevant.

[20] *O'Connor* v. *Chrysler Corp.*, 86 F.R.D. at 217-218.

ination employment cases." [21] To require an employer actually to prove its own prior discrimination would erect an even greater obstacle to voluntary efforts designed to achieve compliance with the law than would discovery of internal evaluations of that subject.[22]

Moreover, requiring the employer to prove its own past discrimination would be inconsistent with the only affirmative action case in which the Court has given significant attention to the question, *Wygant* v. *Jackson Board of Education*, *supra*. Several of the opinions in *Wygant*, expressing the views of a majority of the Court, establish that, once a plaintiff has made out a prima facie case, the employer satisfies its burden by introducing evidence that its plan had a legitimate remedial purpose, by producing, for example, statistical evidence of the sort already discussed. It is then up to the plaintiff to show that this evidence is insufficient to support the plan, *i.e.*, that the employer did not have a reasonable basis for concluding that it could be found to have discriminated in the past, or that the plan is not appropriately limited. See slip op. 9-10 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 9 (plurality opinion) (employer must have "a strong basis in evidence for its conclusion that remedial action was necessary," but "[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program"); *id.* at 11 (Marshall, J., dissenting) ("[t]he Court is correct to recognize, as it does today, that formal findings of past discrimination are not a

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[21] *McClain* v. *Mack Trucks, Inc.*, 85 F.R.D. at 58.

[22] The generally accepted contours of the self-evaluative privilege are strikingly similar to the position that we advance here: hiring and employment statistics are discoverable, but the employer's subjective evaluation of those statistics is not. See, *e.g.*, *Webb* v. *Westinghouse Electric Corp.*, 81 F.R.D. at 433-434. Here as well, we urge that the employer's statistical record is a proper basis for affirmative action (because it is probative of prior discrimination), but that requiring the employer to take the additional step of interpreting those statistics and proving its own discriminatory conduct is inappropriate.

necessary predicate to the adoption of affirmative-action policies"). See also pages 17-19, *supra*.[23]

3. *Placing the burden of proof on employers would serve no legitimate purpose*

Petitioner offers virtually no justification for imposing on employers the burden of proving their own prior discrimination. The United States, however, suggests several purported justifications in an argument that is wholly inconsistent with the views that it expressed in *Weber*.[24] These proposals are abstract and theoretical

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[23] This allocation of the burden of proof also is consistent with that established by the Court in traditional Title VII cases. In those cases, once the employer has, in response to the plaintiff's prima facie case, articulated a legitimate nondiscriminatory reason for its actions, the burden is on the plaintiff to prove that this reason was actually a pretext for discrimination. See, *e.g.*, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802-804 (1973).

[24] The United States claims (Br. 17 n.10, 18) that its present position is consistent with the position it advanced in *Weber*. An examination of the federal government's briefs in *Weber* demonstrates the contrary; in fact, the United States then urged precisely the position that we now support and it now opposes:

> Nor would the purposes of [Title VII] be served by requiring an employer to admit and prove its own violations of the law in order to justify remedial action of this nature. Such a requirement would plainly discourage voluntary compliance. Instead, it would leave an employer in the awkward posture of having to await litigation charging discrimination against minorities while being prohibited from taking steps that would help remedy the effects of its apparent past acts of discrimination. Title VII does not compel such a result.

Brief for the United States and EEOC in *United Steelworkers of America* v. *Weber*, O.T. 1978, No. 78-432, at 19.

> [I]f the evidence suggests that a plaintiff could establish a *prima facie* case and that the defendants do not have an obviously convincing rebuttal, then they should be permitted to confer remedial priorities as a court would were it to adjudicate the case and find unlawful behavior.

Reply Memorandum for the United States and EEOC in *Weber*, at 6-7 (quotation marks omitted).

straws, which fail to take into account the realities of governing at the local level. None of the purported justifications withstands scrutiny.

First, the United States suggests (Br. 16) that, if the ultimate burden of proof were not placed on the employer, the question of remedial purpose would become "a mere matter of statistical balance after all." This contention, however, ignores the fact that a substantial statistical disparity is in itself highly probative of actual discrimination. See pages 16-17, *supra*. Moreover, the plaintiff retains the opportunity under the approach we support to show that, under the particular circumstances, there is no reasonable basis for concluding that such a disparity was caused by the employer's discrimination.

Second, the United States argues (Br. 20) that requiring an employer to prove its own prior illegal conduct would create a "tension" that is "both manageable and useful." In fact, it is neither. As we have explained, imposition of such a burden would erect an insurmountable barrier to the adoption of voluntary affirmative action programs. The United States does not offer any reason for supposing that employers would willingly subject themselves to the disruption and potential liability that its proposed approach would entail.[25]

The use that the United States believes the "tension" would serve apparently is twofold. It allegedly would cause employers to hesitate before embarking on affirma-

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[25] In fact, the federal government's description (Br. 22) of the circumstances under which employers would not be left on the "'tightrope'" of liability to minorities if they do not act and liability to nonminorities if they do supports precisely our position. The United States urges (*ibid.*) that the dilemma will not exist where "there is an insufficient basis for concluding that discrimination has occurred." Yet a statistical disparity of sufficient magnitude to establish a prima facie case could of course present an adequate basis for such a conclusion and, accordingly, would support an employer's judgment that a "serious threat of litigation [by minorities] exists" (*ibid.*).

tive action programs and thereby prevent "casual social engineering" (U.S. Br. 20). According to the federal government, it also would ensure that affirmative action is "kept to the minimum necessary to accomplish the remedial objective" (*id.* at 21). In fact, the typical affirmative action plan implemented by a local government, like respondent's plan at issue here, is not adopted hastily or cavalierly. Rather, such plans are generally adopted only after serious thought and with due regard for the interests of all members of the community. Indeed, it could scarely be otherwise in an area so controversial and with so direct and varied an impact on the local citizenry.

Nor are local governments likely to exceed proper bounds in taking affirmative action. The United States cites no basis for its suggestion (U.S. Br. 20) that local governments routinely engage in "gratuitous" discrimination through over-ardent affirmative action.[26] The political realities of policy development by local decisionmakers directly responsible to the electorate in fact suggest precisely the opposite.[27] Moreover, the legal rule for which we argue requires local governments to tailor their efforts to correction of past discrimination, and this should be sufficient to keep affirmative action within proper bounds.

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[26] We strongly object to the federal government's repetition (Br. 20) of the inappropriate suggestion, advanced previously in its *amicus* brief in *Vanguards*, that governments of cities in which minorities are politically powerful will unfairly discriminate in favor of minorities. We would reject, and we presume that the United States would reject, any suggestion that officials of cities in which minority groups are not politically dominant routinely discriminate against minorities. There is no basis for assuming the converse to be true.

[27] Moreover, public-sector collective bargaining procedures required by statutes in a majority of states ensure that the interests of nonminority union members will be respected when affirmative action plans are considered by local governments. The duty to bargain imposed by these statutes typically will prevent adoption of an affirmative action plan without consultation with employee representatives. Such consultation (as well as binding arbitration where applicable) can be expected to check implementation of proposed plans that are either unnecessary or overbroad.

Finally, the United States urges (Br. 21) that its allocation of the burden of proof would have "the beneficial function of leading to permanent, meaningful reform in the employer's practices." Thoughtful scrutiny and needed revision of employment practices are far more likely to occur, however, when an employer takes voluntary steps to remedy in a comprehensive way problem practices that it has identified—including those that have led to substantial statistical disparities—than when it is confronted with the need to defend against litigation challenging an affirmative action plan.

Thus, permitting voluntary affirmative action under the approach we propose is most consistent with achieving the ultimate goal of Title VII and the Fourteenth Amendment, which is to eliminate discrimination.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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